

1                   UNITED STATES DISTRICT COURT  
2                   DISTRICT OF NEW JERSEY  
3                   CIVIL ACTION NO. 04-2819-SRC-MAS

4                   SHAWN SULLIVAN, et al.,                   MOTIONS

5                   Plaintiffs,

6                   vs.

7                   D.B. INVESTMENTS, et al.,

8                   Defendants.  
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9                   June 29, 2010  
10                  Newark, New Jersey

11                  BEFORE:     HONORABLE STANLEY R. CHESLER, USDJ

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13                  Pursuant to Section 753 Title 28 United States Code, the  
14                  following transcript is certified to be an accurate record  
15                  as taken stenographically in the above-entitled  
16                  proceedings.

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1                 THE COURT: All right. First I will hear the  
2 application of DeBeers to enforce the protective order.  
3 Can I have appearances by counsel please.

4                 MR. SUNSHINE: Good morning, your Honor. Steve  
5 Sunshine for DeBeers. With me, a face recognized by this  
6 Court, of course, Mr. Redburn.

7                 May I also introduce to the Court Katherine Kay.  
8 She's a qualified lawyer in Ontario and also in British  
9 Columbia. She's here appearing before your Honor this  
10 morning.

11                 MS. KAY: Good morning, your Honor.

12                 THE COURT: Good morning. And I'll hear from  
13 respondents.

14                 MR. FOWKES: Joshua Fowkes on behalf of Dr. Gary  
15 French and Nathan Associates.

16                 THE COURT: Good morning to you. All right. Who's  
17 arguing for DeBeers?

18                 MR. SUNSHINE: That will be me, your Honor.

19                 THE COURT: Mr. Sunshine, go ahead.

20                 MR. SUNSHINE: Good morning, your Honor. Steve  
21 Sunshine again. Your Honor, we're before you this morning  
22 for one simple reason, and that reason is that DeBeers gave  
23 Dr. French its confidential data. It selected that data.  
24 It gave him models. It gave him an illustrative model. It  
25 taught him how to use that data, and it did so under the

1 promises that Dr. French would never use that material in  
2 any other context.

3 And what he did is he turned -- after signing the  
4 confidentiality agreement and after agreeing to be bound by  
5 an order that your Honor signed, he's now turned around and  
6 he's using that data against DeBeers in an adversarial  
7 proceeding in the same cause of action against the same  
8 defendants.

9 So, now what we have here are really two questions  
10 and they're related to this basic blatant breach of the  
11 protective order. The first question is whether -- is the  
12 relief around Dr. French's violation of the protective  
13 order, and the second question is relating to Canadian  
14 plaintiff Michelle Fairhurst. She's attempting to inject  
15 herself into this private dispute and --

16 THE COURT: We'll deal with the intervention  
17 afterwards. All right. Do we have counsel for the  
18 Fairhurst plaintiff here?

19 MR. D'ARCY: Yes, your Honor.

20 THE COURT: Who is it?

21 MR. D'ARCY: Andrew D'Arcy.

22 THE COURT: Okay. I'm going to deal with the  
23 intervention separately. First let's deal with the motion  
24 to enforce the protective order.

25 Let me ask you this, Mr. Sunshine. All right. I've

1       got really two components of the protective order that you  
2       are asserting.

3                    MR. SUNSHINE: Correct.

4                    THE COURT: One is essentially a one-year bar on  
5       performing any expert or consultant's services, I think was  
6       the word which was referred to, in connection with this  
7       type of proceeding, and the other is that he would not  
8       utilize or use any information which he obtained pursuant  
9       to the protective order, period.

10                  MR. SUNSHINE: Correct.

11                  THE COURT: Now, let's take the first. All right.  
12       My recollection is -- but please refresh it if I'm wrong --  
13       that the order doesn't explicitly state when the one-year  
14       ban starts, does it?

15                  MR. SUNSHINE: That's correct, your Honor. Let me  
16       say two things and acknowledge, first I think there are two  
17       provisions. There's the use provision and there's the one-  
18       year ban.

19                  To DeBeers, the much more important provision is the  
20       use provision.

21                  THE COURT: Okay. Fine. Then let's dispose of the  
22       one-year thing first --

23                  MR. SUNSHINE: Okay.

24                  THE COURT: -- now, because I take a look and I take  
25       a look at your argument and your argument on the one year

1 tends -- essentially is the one year starts, in your view,  
2 would be when any cert petition and approval of the  
3 settlement by the Third Circuit was denied by the Supreme  
4 Court.

5 MR. SUNSHINE: Your Honor, with respect, that's not  
6 our argument.

7 THE COURT: Okay. It seems like it's a logical  
8 extension of the argument you're making, however.

9 MR. SUNSHINE: No. Our argument, your Honor, is as  
10 follows: Our argument is the one year starts from the  
11 termination of Dr. French's representation in the Sullivan  
12 matter, and the reason why that goes in, if you look at the  
13 paragraph, we'll agree with you that the actual drafting of  
14 that provision in the protective order, I think it's  
15 paragraph 17, is not a model of clarity. I think that was  
16 hard and negotiated between the sides, but the intent of  
17 that was the idea that as long as Dr. French is working on  
18 the Sullivan matter, that he should not be working on other  
19 engagements. And I think if you think about it for a  
20 moment, of the hornets' nest of problems that would occur,  
21 that as long as Dr. French is working on Sullivan, the  
22 problems that happen if he's getting confidential data and  
23 then using it on other matters, and I think if you look at  
24 the affidavit of Mr. Tabacco, obviously, Mr. Tabacco is  
25 well known to this Court.

1           The affidavit of Mr. Tabacco is probably the most  
2 striking piece of evidence as to whether the representation  
3 and the retention of Dr. French has been terminated.

4           And what is striking about that affidavit, Mr.  
5 Tabacco is a very capable lawyer, as your Honor knows from  
6 personal experience, nowhere in that affidavit does Mr.  
7 Tabacco say the retention is terminated. All that  
8 affidavit says is that he hasn't asked Dr. French to  
9 perform work and that he asked him to do an invoice.  
10 Because Mr. Tabacco well knows that this case is up on  
11 appeal in front of the Third Circuit, that class cert is a  
12 big issue, that there is certainly some greater-than-zero  
13 probability and perhaps significant probability that this  
14 will be turned around.

15           Our point, your Honor, is that nowhere has the  
16 retention been terminated, and how else do we know that?  
17 Because Dr. French is still holding on to confidential  
18 documents. Not only is Dr. French still holding on to  
19 confidential documents, your Honor, even Dr. French admits  
20 he reviewed one of these confidential documents to prepare  
21 his affidavit in Fairhurst.

22           THE COURT: We'll deal with that. Would it be your  
23 argument then that the retention continues until the Third  
24 Circuit has in fact decided this?

25           MR. SUNSHINE: My argument, your Honor, is the

1 retention continues until the parties to the retention say  
2 it's terminated. They may terminate it when the Third  
3 Circuit decides it. They may terminate it, you know, at  
4 another time period, but certainly Mr. Tabacco could have  
5 well said in his affidavit in response -- because this  
6 affidavit was asked of Mr. Tabacco knowing full well what  
7 the issues in front of this Court were -- Mr. Tabacco could  
8 have said, look, the retention is terminated. What's the  
9 question.

10 He very carefully chose not to say that. And I would  
11 suggest further, your Honor, that if this is even a  
12 question at all in doubt, we've asked for some discovery  
13 because there's been some questionable excerpts of e-mail  
14 chains where, if that is really the issue, we can get to  
15 the bottom of this question in terms of what the status of  
16 the retention truly is, what the status of this destruction  
17 of the documents and the record truly are.

18 THE COURT: Okay. Now, I'm just curious. All right.  
19 Dr. French sends Mr. Tabacco a letter dated April 18 of  
20 2008 essentially saying my work is done, here's the final  
21 invoice.

22 Now, do we have in the record when he went to work on  
23 this other case?

24 MR. SUNSHINE: Well, your Honor, there's a formal  
25 retention that happens not until December. Our suspicion

1       is -- and excuse me, your Honor -- our suspicion is that  
2       there was a fair amount of discussion before that. But the  
3       reason that -- and pardon counsel handing me something  
4       up -- but I think that there is some record before the  
5       April 18 letter that you're referring to. Dr. French  
6       didn't write that letter out of whole cloth.

7                 In the plaintiffs' materials -- I'm sorry, not the  
8       plaintiffs' -- Dr. French's materials, the first sort of  
9       time that there's been a ping here is Mr. Tabacco writes an  
10      e-mail to Dr. French on April 17th, where he says, Gary,  
11      any chance you can send me your final bill in the next few  
12      days? This is the e-mail exhibit that Dr. French attaches  
13      on April 20.

14               THE COURT: Is Mr. Tabacco involved in the Canadian  
15      litigation?

16               MR. SUNSHINE: No, sir. Well, not to my knowledge, I  
17      should say. And so, my point here is Mr. Tabacco -- and  
18      this is argument, your Honor, not fact, I suspect he's  
19      worried about objectors getting access to materials. This  
20      isn't the conclusion of the retention and this is brought  
21      on by Mr. Tabacco's e-mail here on April 17.

22               THE COURT: All right. So, your argument would be  
23      that he is retained until you folks discharge him.

24               MR. SUNSHINE: No, your Honor. With respect, he's  
25      retained until the people who hired him discharge him.

1                   THE COURT: Okay.

2                   MR. SUNSHINE: And Mr. Tabacco, who has got a case  
3 going, Mr. Tabacco, who I know from my personal discussions  
4 with him, is worried about the case continuing to proceed  
5 and would like to use Dr. French if the case ends up back  
6 before your Honor. And Mr. Tabacco could have well said in  
7 his affidavit, I've discharged Dr. French.

8                   It doesn't say that. It doesn't come anywhere close  
9 to saying that, despite knowing that that's the key issue.

10                  THE COURT: Okay.

11                  MR. SUNSHINE: I do think, your Honor, I mean, that  
12 is my position, your Honor, but I do think that's not the  
13 key issue.

14                  THE COURT: Fine. Then I'll tell you what. Let me  
15 hear from opposing counsel on another issue. Who's arguing  
16 for Dr. French?

17                  MR. FOWKES: I am, your Honor.

18                  THE COURT: All right. Okay. That's Mr. Fowler?

19                  MR. FOWKES: Mr. Fowkes.

20                  THE COURT: I'm sorry?

21                  MR. FOWKES: Mr. Fowkes.

22                  THE COURT: I'm sorry. You've got to write clearer.  
23 Mr. Fowkes, I will tell you quite clearly what my concern  
24 is here. All right. I read your brief. You say that Mr.  
25 French only utilized public portions of the affidavits

1       which were filed in this case in connection with the  
2       Canadian litigation. Correct?

3            MR. FOWKES: Correct, your Honor.

4            THE COURT: Now, those public portions contain  
5       conclusions, do they not?

6            MR. FOWKES: Yes, your Honor.

7            THE COURT: They contain conclusions about the manner  
8       in which the alleged anti-competitive activity of DeBeers  
9       affected various participants in the distribution system of  
10      diamonds. Correct?

11           MR. FOWKES: Conclusions about whether claimants at  
12      different points in the diamond distribution chains were  
13      affected.

14           THE COURT: Fine. Now, when Dr. French voiced those  
15      opinions, to reach those opinions and to reach those  
16      conclusions, are you telling me that he did not utilize  
17      material which DeBeers had provided to him under this  
18      protective order?

19           MR. FOWKES: What I'm telling you, your Honor, is  
20      that the Fairhurst report which is at issue contains  
21      opinions that are so basic, so innocuous and so -- so much  
22      removed from literally economic textbooks, that they can in  
23      no way depend on or rely on or be based on any quantitative  
24      data that DeBeers produced, any regression model that  
25      DeBeers may have shared or anything of the kind.

1                 THE COURT: Okay. So let me ask you this. If I put  
2 Dr. French on the stand right now and I go through his  
3 affidavit, he will be able to demonstrate to me that within  
4 the public knowledge, without any reference at all to the  
5 material which he analyzed in this case, he could, would  
6 and would have in the past made the same conclusion?

7                 MR. FOWKES: What I can tell you with complete  
8 confidence, your Honor, is that if Dr. French were on the  
9 stand and you asked him about the Fairhurst report in  
10 Canada, in particular, even if you grilled him on the  
11 particular paragraphs that DeBeers has compared  
12 side-by-side, Dr. French could again with confidence  
13 testify that that is innocuous, fundamental economics that  
14 reaches one conclusion, your Honor, and that is whether the  
15 class members in Canada were affected, not how much, not  
16 the proportion to which a price increase was absorbed at  
17 different points in the chain, just that they were  
18 affected. He can do that.

19                 THE COURT: Had he ever voiced such an opinion as  
20 part of an expert report or an expert analysis in any  
21 proceeding which he has had before this lawsuit?

22                 MR. FOWKES: I'm sorry. Can you repeat the question,  
23 your Honor?

24                 THE COURT: Has he ever voiced those opinions in any  
25 lawsuit which he participated in before participating in

1 DeBeers?

2 MR. FOWKES: Your Honor, he helped with and authored  
3 class certification affidavits in three lawsuits; one of  
4 which is Industrial Diamonds in the Southern District of  
5 New York, long before this case; another one is Anco, while  
6 he drafted that, the class certification affidavit, he had  
7 never received any confidential information from DeBeers.

8 THE COURT: Did he voice the same opinions that  
9 DeBeers is pointing to in the Canadian litigation?

10 MR. FOWKES: Yes, your Honor.

11 THE COURT: Before reviewing this material?

12 MR. FOWKES: Before reviewing DeBeers material?

13 THE COURT: Yes.

14 MR. FOWKES: I think the class certification issues  
15 in the three cases that Dr. French served as an expert on  
16 before this one involved the same class certification  
17 issues, your Honor.

18 THE COURT: That's not my question. Did he ever  
19 voice the same opinions as an expert before having reviewed  
20 the DeBeers material?

21 MR. FOWKES: I think that the answer to that question  
22 is, your Honor, is yes.

23 THE COURT: Good. Where is Dr. French?

24 MR. FOWKES: Dr. French is in Virginia.

25 THE COURT: Fine. We are going to set up an

1 evidentiary hearing. You are going to have Dr. French  
2 demonstrate to me that every contested paragraph in his  
3 affidavit in connection with the Canadian litigation was  
4 based upon information which was not provided by DeBeers,  
5 which was either publicly available to him or which he had  
6 before.

7 In short, and I will put it bluntly, the fact that  
8 the affidavit which he submitted in the Canadian litigation  
9 does not disclose confidential information is of no moment.  
10 Indeed, there are redacted and unredacted versions of the  
11 affidavit. Correct?

12 MR. FOWKES: Not of the Fairhurst affidavit, your  
13 Honor.

14 THE COURT: No. But of the DeBeers affidavits.  
15 Correct?

16 MR. FOWKES: Correct, your Honor.

17 THE COURT: And each one of those affidavits was  
18 prepared after Dr. French reviewed substantial amounts of  
19 material provided by DeBeers voluntarily after Dr. French  
20 agreed to be bound by a protective order. Correct?

21 MR. FOWKES: I believe that many of the affidavits,  
22 your Honor, were submitted after DeBeers supplied  
23 confidential information.

24 THE COURT: The key ones that are at stake here are  
25 the class certification one?

1                   MR. FOWKES: He submitted several class certification  
2 affidavits, your Honor.

3                   THE COURT: Okay. The point is this -- okay -- I  
4 don't expect that Dr. French, after having reviewed  
5 material, can put ink back in the bottle. Generalized  
6 knowledge which he may have is certainly something which  
7 cannot be put back, but when I'm presented with affidavits  
8 which are virtually verbatim in some respects when I  
9 compare the two affidavits, and the Canadian affidavit is  
10 prepared specifically in connection with this lawsuit --  
11 I'm sorry -- the DeBeers, Shawn -- what's the caption of  
12 this thing?

13                  MR. FOWKES: Sullivan, your Honor.

14                  THE COURT: The Sullivan affidavit is prepared  
15 specifically after reviewing this material, and it's  
16 reviewed for a particular purpose, so that the parties can  
17 jointly demonstrate to this Court that this settlement is  
18 reasonable and that this class can be certified and then,  
19 lo and behold, identical paragraphs are appearing in the  
20 Canadian litigation.

21                  I am totally unpersuaded that the mere fact that the  
22 paragraphs reflect qualitative information as opposed to  
23 quantitative information demonstrates that he could have  
24 reached those conclusions without having significantly and  
25 carefully digested that DeBeers material, and nothing which

1       is presented to me persuades me otherwise.

2                 I will tell you bluntly, Dr. French's affidavit or  
3 certification in this case is a model of what is not said.  
4 I want to know how he was able to reach those conclusions,  
5 even generalized conclusions, without having utilized the  
6 information which was contained in the DeBeers  
7 certifications.

8                 And let me also make this perfectly clear. Dr.  
9 French is a professional. He was paid money, I would  
10 presume thousands upon thousands of dollars in connection  
11 with this lawsuit, and I have every reason to assume that  
12 he knew exactly what he was signing.

13                 As far as the Court's concerned, his ability to use  
14 that information is essentially a matter of contract which  
15 this Court, by signing it, agreed to enforce, and he  
16 doesn't get to walk away from it simply because it doesn't  
17 suit his convenience right now.

18                 MR. FOWKES: Your Honor, may I respond?

19                 THE COURT: You've got one minute and then we'll set  
20 this down for a hearing.

21                 MR. FOWKES: Your Honor, if you take a look at the  
22 Fairhurst report that's at issue, you'll see that the  
23 conclusions are not merely general, your Honor. They are  
24 as if Dr. French is teaching an economics 101 class. He  
25 defines in Fairhurst supply curves, demand curves,

1 equilibrium point. He cites microeconomics textbooks.

2 The conclusions that he reaches are as if he's spoon  
3 feeding it to a student in class, and there's no plausible  
4 explanation that confidential information he received for  
5 totally other purposes to quantify damages and to divvy up  
6 settlement allocations can be used when the Fairhurst  
7 report only is concerning --

8 THE COURT: Let me stop you. He received  
9 confidential information in connection with class  
10 certification submissions in this case, did he not?

11 MR. FOWKES: In connection with some of them, yes,  
12 your Honor, particularly the supplemental class  
13 certification affidavit. And Dr. French does not use that  
14 information until 16 pages later in the supplemental  
15 Sullivan class certification affidavit, 16 pages after the  
16 portion that you contend is virtually identical, and I'll  
17 agree with you, your Honor, they're very similar, but he  
18 doesn't use DeBeers' information until he was divvying up  
19 and allocating the settlement money. He did not need it to  
20 merely conclude class members were harmed.

21 THE COURT: And you know something, that's what he's  
22 going to explain to me in exquisite detail.

23 Miss Trivino, a date for the hearing.

24 THE CLERK: You can either do it July 1st or July  
25 13th.

1           THE COURT: July 13.

2           THE CLERK: 10:00?

3           THE COURT: Yes.

4           MR. SUNSHINE: Your Honor, just to make that hearing  
5 more efficient, we ask for the right to take Dr. French's  
6 deposition in advance of that hearing.

7           THE COURT: No. We'll do it here now.

8           MR. SUNSHINE: Thank you.

9           MR. FOWKES: Your Honor, could you clarify again the  
10 goals of the hearing just so that I'm clear?

11          THE COURT: Yes. I want the doctor to demonstrate to  
12 me convincingly that the certification which he gave in the  
13 Canadian litigation did not use or require the use of  
14 information which was obtained by him in connection with  
15 his role in Sullivan vs. DeBeers.

16          MR. FOWKES: Thank you.

17          THE COURT: All right. Now, the intervention motion,  
18 this is a motion to intervene, if I recall correctly,  
19 permissive intervention. Correct?

20          MR. D'ARCY: Yes, your Honor.

21          THE COURT: Why should I permit it?

22          MR. D'ARCY: Your Honor, for the record, Andrew  
23 D'Arcy from D'Arcy, Johnson & Day, and with me is Canadian  
24 counsel, Reidar Mogerman.

25          Your Honor, as was just detailed, Dr. French is now

1       an expert that is put before the Canadian court with an  
2 affidavit for a class certification. We, of course,  
3 believe that this is simply an alternative position because  
4 we believe that now, following your most recent ruling,  
5 that Dr. French will confirm at the hearing on July 13 that  
6 his information was something that could be taught to an  
7 economics 101 class.

8           In the event that that is not the case, we, given the  
9 right to intervention that is detailed in the brief, we  
10 feel that this is a timely application with obviously  
11 common elements of law and fact and that the prejudice to  
12 DeBeers has not been established, and the only prejudice  
13 that we can see is that it would give them -- it would  
14 actually be a prejudice to the plaintiff, Canadian  
15 plaintiffs giving DeBeers tactical advantage.

16           Throughout the motion opposition brief, we could not  
17 identify any direct prejudice other than an argument that  
18 there was reliance on the agreement that was put into place  
19 and, your Honor, simply put, we believe that that argument  
20 must fail in fact since the affidavit that is at issue was  
21 put into the public system, the public process. There is  
22 nothing confidential or confidential information which is  
23 being sought from Dr. French at this time.

24           THE COURT: I have two questions. First of all,  
25 courts generally don't permit a party to intervene when

1       their interests are already adequately and fully  
2       represented by one of the parties to the action. Correct?

3                   MR. D'ARCY: Yes, your Honor.

4                   THE COURT: What is there about Dr. French's role in  
5       this that does not adequately protect your interests?

6                   MR. D'ARCY: Well, your Honor, I believe that the  
7       plaintiffs in Canada, and Michelle Fairhurst as the  
8       representative of that class, has a direct interest that  
9       Dr. French is obviously putting forth his position here  
10      that he has not violated the protective order.

11                  However, for purposes of those Canadian plaintiffs, I  
12      think they have a direct interest in having Dr. French  
13      involved in this litigation that may not be exactly similar  
14      to Dr. French, who may be willing to just accept the fact  
15      that there is a protective order issue and if, in fact, the  
16      protective order is found to be violated, we're then coming  
17      in on behalf of the plaintiffs to say, your Honor, we  
18      should have our chance to use Dr. French.

19                  THE COURT: So, your argument is that the protective  
20      order should be modified to the extent that Dr. French may  
21      have relied upon information which he obtained as a result  
22      of his examination of the material which DeBeers provided,  
23      even if that happens to in fact be violative of the  
24      protective order which he agreed to. Correct?

25                  MR. D'ARCY: Yes, except that we do not believe that

1 it was violative.

2 THE COURT: I understand that. But if per chance it  
3 happens to be violative of the protective order which he  
4 agreed to, you should nevertheless be able to use Dr.  
5 French and the information which he proposes to use in  
6 violation of the order. Right?

7 MR. D'ARCY: Yes, your Honor.

8 THE COURT: Okay. Now, would you say that that might  
9 be viewed as essentially an effort to do an end run around  
10 an agreement which Dr. French voluntarily and freely  
11 entered into?

12 MR. D'ARCY: I would not, your Honor, and the simple  
13 reason is because when you break this down, what I am  
14 trying to relay to the Court is that we don't see the  
15 prejudice at this juncture and, your Honor, keeping in mind  
16 that we are just talking about the class certification  
17 stage, we just don't see the prejudice as to what we're  
18 submitting to the Canadian courts.

19 THE COURT: Let me ask you something. All right. I  
20 assume that you are fully familiar with the history of  
21 Sullivan vs. DeBeers -- okay -- so Then you know that as a  
22 practical matter, until the moment this case settled,  
23 DeBeers was in default.

24 I had, in fact, granted a default against DeBeers  
25 probably years before the settlement was reached. You are

1 aware of that, are you not?

2 MR. D'ARCY: Yes, I am, your Honor.

3 THE COURT: And you are aware that that was largely  
4 because, at least my understanding is that DeBeers'  
5 position was that we are not subject to *in personam*  
6 jurisdiction in the United States. If you get a judgment  
7 against us, good luck trying to enforce it around the  
8 world, and by not even participating in litigation here, we  
9 preserve our position to the extent that any plaintiff  
10 tries to enforce that judgment.

11 You are aware of that, are you not?

12 MR. D'ARCY: Yes, your Honor.

13 THE COURT: Okay. Lo and behold, it appears that  
14 after mediation with Judge Politan, which, by the way, the  
15 Court was not involved in, they rounded up Judge Politan on  
16 their own, if I recall correctly, and decided one day to  
17 inform the Court that they had reached a settlement and  
18 were asking the Court to consider preliminary approval, if  
19 I recall correctly. Right? And voluntarily those parties  
20 agreed that they were going to exchange material which  
21 would be relevant to determining damages, class  
22 certification issues, and having the Court ultimately rule  
23 on whether or not the settlement could be approved as fair  
24 as reasonable and whether or not a class in fact could be  
25 certified.

1           As a result of that, they negotiated an agreement  
2 concerning this material, material which was not obtained  
3 through the use of court process, not obtained through  
4 notices to produce or depositions or subpoenas, but through  
5 an agreement between the parties in that lawsuit in which  
6 every expert agreed that the material which they were  
7 exposed to was going to be limited. Correct?

8           MR. D'ARCY: Yes.

9           THE COURT: And in support of your position, you're  
10 citing cases like Pansy vs. Stroudsburg, is it, which deal  
11 with umbrella protective orders in the context of Rule 26  
12 through 37 discovery. Correct?

13           MR. D'ARCY: Correct.

14           THE COURT: And by the way, I have between you folks  
15 a vast dispute about whether or not Canadian courts would  
16 ever authorize this material to be produced by DeBeers.  
17 Correct?

18           MR. D'ARCY: There is a dispute, yes.

19           THE COURT: Have you sought that information in the  
20 Canadian courts?

21           MR. D'ARCY: It would not be permissible at this  
22 juncture in the Canadian litigation.

23           THE COURT: Now, if I recall correctly, there is,  
24 first of all, a U.S. statute which permits a party to seek  
25 discovery in the United States for use in a foreign court.

1 Have you used those provisions?

2 MR. D'ARCY: I do not believe so, your Honor.

3 THE COURT: Do you know whether or not Canada is a  
4 party to the Hague Convention?

5 MR. D'ARCY: I believe they are, your Honor.

6 THE COURT: Okay. I will tell you bluntly, as far as  
7 I'm concerned, my characterization of your intervention  
8 motion is accurate. You've only sought relief from the  
9 protective order to the extent that Dr. French used  
10 material that was obtained pursuant to the protective  
11 order. You have not sought generalized discovery. You  
12 said it's very limited. That tells me this is simply an  
13 alternate way of trying to achieve the use of Dr. French  
14 and, as far as I'm concerned, to that extent permissive  
15 intervention should be denied because your interests, to  
16 the extent that they in fact should validly be considered  
17 by this Court, are fully represented by Dr. French.

18 Now, I can tell you right now that if a Canadian  
19 court were to order DeBeers to provide information and  
20 their response to the Canadian court was we can't because  
21 there's a protective order in Sullivan vs. DeBeers which  
22 bars us providing this information, you're welcome here any  
23 time to litigate whether or not that protective order  
24 should be modified under the Pansy standard. But that's  
25 not what you're asking me to do. The application to

1       intervene is denied.

2                    MR. D'ARCY: Thank you, your Honor.

3                    THE COURT: Oh, yes. Finally, just so we clarify,  
4       Mr. Sunshine, I agree with you that your real argument is  
5       whether or not Dr. French utilized and had to utilize  
6       information which DeBeers provided to him in connection  
7       with material which he is submitting to the Canadian court  
8       and in connection with preparing it.

9                   In short, if it's purely textbook economics, you  
10      lose. If it's not purely textbook economics but in fact it  
11      is material, it could only have been reached on the basis  
12      of review of your material, you win.

13                  As far as your argument about the one year, I wish  
14      you luck in another court, but as far as I'm concerned,  
15      that one year ran when he finished making his reports and  
16      he asked for his bill.

17                  Is it conceivable? Hey, of course it's conceivable.  
18      You folks were at the Third Circuit. The Third Circuit --  
19      I'm not infallible. All right. And as superb a job as  
20      Judge Wolin did in giving his special master's report, he's  
21      not infallible. The Third Circuit might send this back,  
22      might totally reject it. All right. That's understood.  
23      But that's a bridge which you cross when you come to it.

24                  Dr. French doesn't get held on the book indefinitely  
25      for a potential remand by the Third Circuit, so, that

1 aspect of your argument is rejected.

2 MR. SUNSHINE: Okay.

3 THE COURT: Just so you know where you stand right  
4 now when we get to our hearing. All right.

5 MR. SUNSHINE: I understand, your Honor. I  
6 understand.

7 On the first point, your Honor, we understand there's  
8 an evidentiary hearing coming, but I do want to say we do  
9 disagree very strongly with counsel's characterization and  
10 we'll come prepared.

11 THE COURT: And I appreciate that but, you know  
12 something, that's why I'm going to have a hearing and, you  
13 know something, I'm not going to have a deposition for a  
14 very good reason, which is you folks are trial lawyers. Do  
15 what trial lawyers do, examination and cross examination --

16 MR. SUNSHINE: We'll look forward to it, your Honor.

17 THE COURT: -- as opposed to interminable depositions  
18 upon depositions upon depositions. Thank you very much,  
19 counsel.

20 MR. SUNSHINE: Thank you, your Honor.

21 (Whereupon the proceedings are adjourned.)

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